RE TEOH HENG HAN; EX P OCBC BANK (M) BHD

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[BANKRUPTCY NO: D3-29-1523-2007]
21 APRIL 2010

BANKRUPTCY: *Adjudication and receiving orders - Setting aside - Whether bankruptcy notice not in accordance with terms of amended judgment - Whether creditor's petition invalid for not stating person authorised under seal - Whether issues raised after time or opportunity to do so had passed*

CONSTITUTIONAL LAW: *Courts - Judicial power - Hearing of creditor's petition in bankruptcy proceedings - Registrar's power to hear petition - Whether only a judge of High Court or Judicial Commissioner may hear petition - Whether s. 90 Bankruptcy Act 1967 and/or r. 5 of Bankruptcy Rules 1969 ultra vires Federal Constitution and Courts of Judicature Act 1964*

Adjudicating and Receiving Orders were made against the judgment debtor ('appellant') on 22 October 2008. He applied to set aside the Orders but his application was dismissed by the senior assistant registrar. The appellant then appealed to the High Court Judge in chambers. The appellant's counsel submitted that the jurisdiction or power vested in the senior assistant registrar or deputy registrar ('Registrar') to hear the creditor's petition in bankruptcy proceedings was *ultra vires* the Federal Constitution ('Constitution'). He asserted that as the Constitution vested the judicial power of the High Court, in the High Court Judges and Judicial Commissioners, consequently only a Judge of the High Court or a Judicial Commissioner might hear a petition in the High Court. On the merits, the appellant, *inter alia,* contended that: (i) the bankruptcy notice (BN) was invalid because it was not in accordance with the terms of the amended judgment; (ii) the creditor's petition was invalid on the grounds that it did not state that one, 'Ooi Jung Liang' was authorised under seal.

Held (dismissing the appellant's appeal with no order as to costs):

(1) The High Court, Court of Appeal and Federal Court were superior courts vested with jurisdiction and/or power to protect the constitution. It was not permissible to reduce the status of

A the superior courts to tribunals by judicial interpretation of the Constitution as only tribunals or inferior courts were solely dependent on the statute for its jurisdiction and powers. There was no merit in the judicial power argument raised by the appellant in respect of registrars as the registrar's power to hear
B cases was limited to the powers provided by statute, rules, *etc.* and that power could not be equated to judicial powers vested in the superior courts. (para 12)

(2) The issue raised by the appellant relating to the registrar's
C jurisdiction could not be entertained at the High Court stage as the law, practice and procedure in bankruptcy matters recognised the role of registrars. There was a specific direction issued by the Chief Justice on matters that could be heard by the registrar and the hearing of the creditor's petition was one
D such application. (para 13)

(3) The appellant's contention that the registrar in hearing a creditor's petition was exercising judicial power contrary to art. 121 of the Constitution was incorrect. The Constitution
E expressly recognised the role of the registrar of the High Courts and the fact that they were entitled to make decisions which might be appealable under Federal law to the judge of the High Court. The decision of the registrar was not final and was appealable by way of rehearing pursuant to the rules of
F procedure. The final decision maker was the judge of the High Court which decision was appealable pursuant to the Act of Parliament. The Court of Appeal and the Federal Court were only obliged to look at the High Court judge's decision and not at the decision of the registrar. There was also greater
G protection under s. 90(1) of the Bankruptcy Act 1967 for the judgment debtor as the decision of the registrar was not final when there was an appeal and the registrar's order was stayed until disposal of the appeal by the judge. (para 13)

(4) The bankruptcy proceedings were regular and the appellant did
H not raise the above issues and other issues at the material stage of the proceedings when he had every opportunity in law to do so. It was too late for the judgment debtor to raise the same. Accordingly, the appeal was dismissed with no order as to costs. *Re Bahanudin Hj Mokhtar, ex p RHB Bank And Other Appeals*
I (refd); *Re Amarjit Kaur Bakhshis Singh, ex p BSN Commercial Bank (Malaysia) Bhd* (refd); *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* (refd); *J Raju M Kerpaya v. Commerce International*

Merchant Bankers Bhd (refd); *Re Woo Yoke San; Ex P OCBC Bank Bhd* (refd); *Re Tan Sri Amin Shah Omar Shah; Ex p Affin Bank Bhd* (refd); *In re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd* (refd); *Re Mat Shah Safuan; Ex P United Asian Bank Bhd* (refd); r. 215 Bankruptcy Rules 1969. (paras 14 & 15)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Affin Bank Bhd v. Tan Sri Kishu Tirathrai [2008] 2 CLJ 448 CA ***(refd)***

Chai Kheng Lung v. Inspector Dzulkarnain Abdul Karim & Anor [2009] 7 CLJ 133 HC ***(refd)***

Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah [2007] 5 MLJ 441 ***(refd)***

Dato' Dr Zambry Abd Kadir v. Dato' Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General Of Malaysia (Intervener) [2009] 5 CLJ 265 CA ***(refd)***

In re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd [2001] 8 CLJ 226 HC ***(refd)***

Indira Nehru Ghandi v. Raj Narain AIR [1975] SC 2299 ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Malayan United Finance Bhd v. Adsonii (M) Sdn Bhd [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435 HC ***(foll)***

Minerva Mills Ltd v. Union of India AIR [1980] SC 1789 ***(refd)***

Moses Hinds and Others v. The Queen [1977] AC 195 ***(refd)***

Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

Re Amarjit Kaur Bakhshis Singh, ex p BSN Commercial Bank (Malaysia) Bhd [2001] 1 CLJ 412 HC ***(refd)***

Re Bahanudin Hj Mokhtar, ex p RHB Bank And Other Appeals [2000] 1 CLJ 593 HC ***(refd)***

Re Hj Khalid Abdullah, Ex P Danaharta Urus Sdn Bhd, [2008] 2 CLJ 326 ***(refd)***

Re Mat Shah Safuan; Ex P United Asian Bank Bhd [1990] 1 LNS 115 HC ***(refd)***

Re Tan Sri Amin Shah Omar Shah; Ex p Affin Bank Bhd [2008] 9 CLJ 772 HC ***(refd)***

Re Woo Yoke San; Ex P OCBC Bank Bhd [2006] 2 CLJ 589 HC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1998] 3 CLJ 85 CA ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 88, 90(1)
Bankruptcy Rules 1969, rr. 3, 5, 215
Civil Law Act 1956, s. 3
Courts of Judicature Act 1964, ss. 4, 10(1), (3), 15(1), 25
Federal Constitution, art. 121(1), 122AA, 122AB, 123, 125, 132(1)(b), (3)(c)
Rules of the High Court 1980, O. 32 r. 9

For the appellant - Abdul Razak Hashim (T Gunaseelan with him); M/s Gunaseelan & Assoc
For the respondent - Teng Chong Moi; M/s Lee Ong & Kandiah

Reported by Susheila Sreedharan

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the appeal by the judgment debtor to set aside the adjudicating and receiving order dated 22 October 2008 which was dismissed by the learned senior assistant registrar.

[2] Lead counsel for the appellant, Encik Abdul Razak bin Hashim had placed an expressive submission in respect of jurisdiction to say that the jurisdiction or power vested in the senior assistant registrar or deputy registrar (registrar) to hear the creditor's petition in bankruptcy proceedings is *ultra vires* the Federal Constitution. And asserts that the Federal Constitution vests the judicial power of the High Court, in the High Court Judges and Judicial Commissioners and in consequence only a judge of the High Court or a Judicial Commissioner may hear a petition in the High Court. And relies on art. 122AA, 122AB, 123 and 125 of the Federal Constitution, to say that Judges and Judicial Commissioners are part of the judiciary and have been afforded special protection to ensure their independence; whereas registrars are appointed under s. 10(1) of the Courts of Judicature Act 1964 (CJA 1964). And s. 10(3) of the CJA 1964 provides for the jurisdiction, powers and duties of registrars. And subsection 3 provides that the registrar shall, subject to this act or any other written law have the same jurisdiction, powers and duties as the masters of the supreme court, clerks of criminal courts, registrars and like officers in the supreme court of judicature in England and, in addition, such further

jurisdiction, powers and duties as may be prescribed by rules of court. And with regard to the issue of a registrar hearing creditor's petition the Bankruptcy Rules 1969 (BR 1969), r. 5 provides that "unless the Chief Justice has given a general or special direction to the contrary: (a) every application before the registrar shall, and every application before the judge may, be heard in chambers; and (b) the jurisdiction of the court to hear and determine any matter or application may be exercised by the registrar.

In essence the learned counsel says that s. 10(3) CJA 1964 and/or s. 90 of the Bankruptcy Act 1967 (BA 1967) and/or r. 5 of the BR 1969 which purport to vest jurisdiction or power in the registrar, to hear creditor's petition in bankruptcy proceedings is *ultra vires* the Federal Constitution.

[3] In addition says that s. 90 of BA 1967 and r. 5 of BR 1969 are *ultra vires* the CJA 1964, taking into consideration s. 4 of CJA 1964 which states that:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

And asserts that the supreme law of the land is the Federal Constitution and any statute which is inconsistent with the Federal Constitution, would be *ultra vires* the constitution and consequently invalid. And also asserts that CJA 1964 enjoys a special position, in that, the CJA 1964 will prevail over any other Act inconsistent with it, except the Federal Constitution.

Judgment Debtor's Submission

[4] And the learned counsel submission can be summarised as follows:

(a) The scheme of the Federal Constitution is that there is a separation of powers. The doctrine of separation of powers is an essential feature of the Federal Constitution.

(b) The Court of Appeal in *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85, through Gopal Sri Ram JCA (as he then was) said "the Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and indeed, all laws enacted by the legislative arm of the government". And His

lordship then referred to "*Minerva Mills Ltd v. Union of India* AIR [1980] SC 1789" where Bhagwati J, spoke of the separation of powers.

(c) In *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1998] 3 CLJ 85, the Court of Appeal held that the amendment to art. 121(1) of the, Federal Constitution, whereby the words "judicial power of the federation" were deleted on 10 June 1998 by Act A704 has not taken away the judicial powers from the High Court.

(d) In *PP v. Kok Wah Kuan* [2007] 6 CLJ 341 at p. 359, Richard Malanjum CJ SS observed that: "The amendment which states that 'the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law' should be by no means be read to mean that the doctrine of separation of powers and independence of the Judiciary are now no more the basic features of the Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a Federal Act of Parliament and that the courts are now only to perform mechanically and command or binding of a Federal law."

(e) The Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, speaking through Justice Gopal Sri Ram observed that: "... Such a course would constitute unauthorised judicial legislation and a breach of the doctrine of separation of powers enshrined in the Federal Constitution."

(f) What is meant by judicial power was explained by Zakaria Yatim J in *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284, where his lordship held "under our constitution the words "judicial power of the federation" have been defined to mean "that the court has the power to adjudicate in civil and criminal matter which are brought before the court".

(g) The supreme court in *Public Prosecutor v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284, speaking through Abdoolcader SCJ opined that judicial power may be defined as "the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties".

(h) When a registrar hears or purports to hear a creditor's petition, the registrar exercises judicial power.

(i) Article 132(1)(b) of the Federal Constitution provides for that members of the judicial and legal services are part of the public service. In other words members of the judicial and legal service are part of the executive and not the part of the judiciary. In fact art. 132(3)(c) of the Federal Constitution provides that the public service shall not compromise "the office of the judge of the federal court, the court of appeal or a high court".

(j) The registrar, being members of the judicial and legal service are members of the executive, purporting to exercise judicial power contrary to art. 121 of the Federal Constitution which vests judicial power in the judiciary.

(k) The purported exercise of judicial power by registrar is a violation of the doctrine of separation of powers which is integral part of our constitution.

(l) The Privy Council has had the occasion to deal with the issue of the executive transgressing into the realm of the judiciary. (And relies on the case of *Moses Hinds and Others v. The Queen* [1977] AC 195.)

(m) The registrar has no jurisdiction or power to hear creditors' petition as it would tantamount to acting illegally notwithstanding the provisions of the CJA 1964 or the BR 1969.

(n) The fact that only High Court Judges or Judicial Commissioners may hear matters in the High Court is further evidenced by the s. 15(1) of the CJA 1964 which provides "the place in which any court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court shall have power to hear any cause or matter or any part thereof in camera if the court is satisfied that it is expedient in the interest of justice, public safety, public security or propriety, or for other sufficient reason to do so."

(o) From the above it will be abundantly clear that a registrar has no jurisdiction to hear a creditor's petition.

(p) Judges and Judicial Commissioners are required to take an oath under the Constitution before they can exercise their jurisdiction or power but a registrar being part of the executive need not take that oath under the Constitution to exercise the same jurisdiction and power.

(q) And asserts that the argument by the appellant may be seen to be extreme. And says what is most important is that the Federal Constitution must be preserved, protected and defended, at any cost. And any attempt to whittle down the doctrine of separation of powers must be resisted.

Judgment Creditor's Submission

[5] The learned counsel for the respondent says that the registrar has the jurisdiction and/or power to hear creditors petition by reasons of the following: a) Federal Constitution – art. 121(1) and a) art. 121(B); b) BA 1967 and the BR 1969; c) Section 10(3) of the CJA 1964; d) Order 32 RHC 1980.

[6] In addition says that the words "judicial power" which the judgment debtor seeks to rely on previously existed but now no longer exists in the Federal Constitution. And relies on the Federal Court decision of *PP v. Kok Wah Kuan* [2007] 6 CLJ 341, (*Kok*'s case) at pp. 352-353:

> What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be ...

Further, at pp. 355-356:

> Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' So, we will have to look at the federal law to know the jurisdiction and powers of the courts ...

So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides ...

[7] I take strong disagreement on the respondent's submission to impute that the superior courts are no more vested with judicial power, a power, which is often seen as the soul of the superior courts. The doctrine of separation of powers, judicial review, judicial powers etc; are all inextricably interwoven in jurisprudence. I have dealt with this area of jurisprudence to some extent in *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah* [2007] 5 MLJ 441 where I have observed as follows:

[20] I think, to efficiently deal with the preliminary objection or protest in the right perspective, it is necessary and essential for me to make a critical appraisal of the origin, concept, and limitation of the doctrine of judicial review and the wider concept of doctrine of separation of powers and to set it out in a summary manner, I have, *inter alia*, relied on the following works, namely: (i) Datuk Dr Rais Yatim, Freedom Under Executive Power in Malaysia, ...

[21] Judicial review is nothing but a potent and effective procedural device within the armoury of the High Court to supervise and control the decision making process of public bodies or like to ensure that they act within the spirit and powers of the statutes and if necessary to restrain the decision maker from acting in excess and/or abuse of power. This process is also used to check and arrest executive excesses and encroachment. The concept originates from the doctrine of separation of powers which flows from English legal jurisprudence and in the Malaysian context it can be explained in a simple manner as follows:

(i) The doctrine of separation of powers is not a concept written in the Federal Constitution, because it is the foundation of the constitution itself, without which the establishment will collapse and will have no footing to stand on. There are also other concepts such as Independence of Judiciary, Judicial Review, which are not written in the constitution but stands as a sine qua non to protect the constitution and without these concepts and its application the constitution cannot function as intended. As such the constitution cannot be read in isolation.

(ii) The three pillars of the constitution, namely the executive, legislature and the judiciary, directly and/or indirectly, which I say is the foundation for the constitution, are appointed at the pleasure of the public. For, the two pillars can be replaced by the public and one pillar only by parliament, and who should be in parliament is always determined by the public.

(iii) All the said pillars before coming into office take an oath to protect the constitution. In consequence, they have taken upon themselves a sacrosanct duty and obligation to the public to ensure that one pillar does not undermine the other in whatever manner, because the weakness of any of the pillars will undermine the stability of the constitution and this will ultimately affect the public. Although, humans can stand on two legs or one, the Federal Constitution needs all three to stand individually to uphold the constitution and protect the public. This concept of standing separately to protect public interest is often termed as the doctrine of separation of powers.

(iv) Under the said doctrine, executive, with the help of legislature can pass any laws within the frame work of the constitution only. However, when any laws are made to exclude the final decision making process by the courts, they will tantamount to tinkering with one of the pillars of the constitution itself and thereby weaken the judiciary and this will also undermine the constitutional role of the courts. This *per se* is not permissible as it will result in the public being ruled by law and not by rule of law, as envisaged by the Federal Constitution at the time of its inception. This doctrine is articulated by art 4 of the Federal Constitution which asserts that the constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this constitution, shall to the extent of the inconsistency, be void. And this is very importantly reflected in Rukun Negara or the pillars of the nation which commands: Belief in God, Loyalty to King and Country, upholding the Constitution, Rule of Law, Good Behaviour and Morality. And the concept of rule of law does not permit legislature or executive to subject its citizen to any form of arbitrariness which will impinge on them to enjoy the dignity of man. And the judiciary is required to protect that dignity.

(v) The judges have taken oath of office to protect the constitution. The executive and legislatures under the doctrine of separation of powers has a duty to the public to ensure that judges' oath to protect the constitution is not made illusory by enacting laws which attempts to take judicial scrutiny on executive decisions. This duty is a sine quo non to protect the constitution, the protection of which in its true sense means protecting the public. This is also the basic tenet of the constitution and Rukun Negara.

(vi) Parliament cannot pass law or amend the constitution to bypass judicial supervision on executive decision as it will be totally abhorrent to the notion of the doctrine of separation of powers. There is no doubt that Parliament is supreme, subject only to the constitution, any attempt to tinker with the foundation will be against their oath of office and such attempt will have to be treated by the courts as *ultra vires*, the spirit and intent of the constitution by virtue of the doctrine of separation of powers when it comes for judicial scrutiny. Further, it will be against judges' oath of office to consider such laws and the decisions which recognise such laws are always unconstitutional but still valid unless set aside. Where decisions are perceived to be unconstitutional, the courts have a judicial duty coupled with sacrosanct entrustment of the public, pursuant to the doctrine of the separation of powers and oath office, to revisit such decisions in the wider interest of the public and also to uphold their esteem and dignity as judges of their constitution and also as the component pillar of the Federal Constitution. At the same time, the judiciary has sacrosanct duty to ensure that the functions of the executive and the legislature, in the right perspective, are not undermined. There is a balance of cardinal importance which has to be met with to maintain the respective role and status quo of the pillars. In consequence, pure interpretation of law which may destabilise the constitutional role of the executive and legislature and undermine the progress, development and stability of the nation is averted and the interpretation of certain aspects of the law is tempered with matured interpretation. In England, they discreetly call it as 'policy consideration' which more often than not is reviewed on case by case basis, according to the needs of the nation, taking into consideration public interest as a whole ...

(x) Much literature has been fashioned by jurists and judges proclaiming the courts' jurisdiction and powers in a restrictive manner. It will appear to be unnecessary as this creates utter confusion, for under the doctrine of separation of powers, the court is the supreme body to decide what is right and what is wrong in any given circumstance ... Judicial fetter must not be seen as absolute and immutable fetter as the courts have jurisdiction and powers, *inter alia*, under the doctrine of separation of powers to revisit them and act according to the justice of the case. In particular, when it is not related to matters involving interests of national security or public order in its true sense.

(xi) All the three pillars are expected by their oath of office to provide exemplary duty to the nation and that service is much more superior to any other service provided by any of the institutions in the country, because it is a sacrosanct duty which needs full courage and commitment to ensure, peace, prosperity, harmony to the public and its future generations. And this exemplary mission can only be achieved by upholding the spirit and interest of the Federal Constitution and nothing less. For this very purpose, each pillar has to respect the role of the other, and there is sufficient provision in the constitution and law to check each and every pillar's excesses and make them accountable to the public. One such provision permits the judges to be removed and the other is the provision for judicial review to check among others executive excesses. Thus, it is a well planned constitution and law, provided it is given full force and effect. No pillar is supreme. All are subject to accountability. Each pillar is not expected to compete with each other, which is the foundation of the constitution. They are required to respect each other and also complement each other for nation building. And also accept that the Federal Constitution with the doctrine of separation of powers, independence of judiciary and judicial review is the charter for progress, democracy and nation building in the right perspective. In *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, HRH Raja Azlan Shah FJ (as HRH then was) articulated some of the difficult propositions and concepts as follows:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts:
>
> One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men ...
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> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as

> such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as the supreme law of the Federation … (cl. 1 of art 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable ...
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> There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment.

[8] The doctrine of separation of powers is a well recognised concept in Malaysia and the Commonwealth and from time to time advocated by the apex court. And the concept relating to judicial power stands as its soul, to protect the constitution. The observation of one learned judge in *Kok*'s case in relation to judicial power with respect must be seen at the most as *res integra*; as only one learned judge advanced such an opinion to limit the parameters of judicial power and the other who also participated in writing of the judgment strongly dissented and the majority on an important issue was silent as it was not necessary to deal with that issue at that stage though all were unanimous in allowing the appeal. Further there was no legal jurisprudence of sufficient nature advanced by the learned counsels in that case on an issue relating to the soul, of the constitution as well as the doctrine of separation of powers, in the right perspective to justify a conclusion at the apex stage.

[9] Business Dictionary.com defines judicial power as constitutional authority vested in courts and judges to hear and decide justifiable cases, and to interpret, and enforce or void, statutes when disputes arise over their scope or constitutionality. In the Malaysian context the definition is much more wider and does not necessarily confine to the Federal Constitution *per se* to search for the vested rights

which are not spelled out in the Federal Constitution or Statutes giving jurisdiction and powers to the court. Support for the proposition can be found in art. 4, s. 3 Civil Law Act 1956, s. 25 CJA etc; and a number of case laws.

[10] It cannot be doubted for a moment that the Federal Constitution and the Federal statutes recognises the doctrine of separation of powers, judicial review, judicial power, etc; in contrast to the view expressed in *Kok*'s case. And quite recently the Court of Appeal in *Dato' Dr. Zambry Abd Kadir v. Dato' Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia, (Intervener)* [2009] 5 CLJ 265 the quorum consisting of Justice, Raus Sharif, Zainun Ali and Ahmad Maarop had asserted that the Malaysian system of government is founded on the Westminster model and observed as follows:

> [79] A brief outline of the essential features of the Federal Constitution will be useful. This is because much of what is found in the Federal Constitution are reflected in the State Constitution.
>
> [80] Inclined as is the Federal Constitution towards the Westminster structure, it has its own peculiarities. The Westminster model is not to be found in one document, but could be seen in bits and pieces in the Magna Carta, the Bill of Rights, the Act of Settlement and a series of Parliament Acts. Conversely, the Federal Constitution however is embodied in one document and gathers unto itself various sources of law some of which are implicit. The unique presence of the written law, shot through with informal and unwritten sources in the form of conventions, prerogatives, discretionary and residual powers as such, help ensure the continuation of constitutionalism and the rule of law. Thus the sources of law in our Constitution are several. Article 160(1) of the Federal Constitution says it all. 'Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.'

Chandrachud J in *Indira Nehru Ghandi v. Raj Narain* AIR [1975] SC 2299, had asserted that the constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. The proposition was affirmed and quoted by Gopal Sri Ram FCJ in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507:

> The framers of our Constitution (like the framers of the Indian Constitution) derived the equality clause from the Constitution of the Irish Free State. The equality doctrine in reality is drawn from Dicey's Rule of Law one of the pillars of which is that persons are equal before the law. As pointed out by Chandrachud J in *Indira Nehru Ghandi v. Raj Narain* AIR [1975] SC 2299, 2470:
>
> > Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the Courts. (emphasis added)

And at para 17 made the following observation:

> What does "law" mean? As earlier observed, by definition it includes written law and the common law of England. This is the result when art. 160(2) is read with s. 66 of the Consolidated Interpretation Acts 1948 and 1967. Also see, Lee Kwon Woh. "Law" therefore means a system of law that encompasses the procedural and substantive dimensions of the rule of law. And this is the point at which arts. 8(1) and 5(1) interact.

In addition the learned judge of Federal Court articulated the meaning of basic fabric or structure of the constitutions as follows:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
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> This earlier view was obviously overlooked by the former Federal Court when it followed Vacher's case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art. 8(1). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See, *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461.

[11] The entire legal system, to a large extent is based on Westminster constitutional theory. And in my view judicial power vested in the court by the Federal Constitution upon its birth is not a subject matter vested by Parliament for the power to be revoked. It is a power entrusted by the public to the court and that power cannot be removed by Parliament or court through a scheme of interpretation as it will go against judge's oath of office to protect the constitution. And such interpretation must always be seen to be arbitrary or illegal if the judgment is not supported by legal jurisprudence and/or decision of respected jurisdiction in the commonwealth. And such interpretation are not binding on each and every judge as judges have taken a sacrosanct oath to defend the constitution and such an oath is not a collective oath to recognise unconstitutional proposition or fatally wrong jurisprudence like that advocated in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 which was rightly over ruled by the apex in the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269. The learned professor Dr. Ashgar Ali bin Ali Mohamed in his article *Rationale for Departing from Stare Decisis: A Review of Re Hj Khalid Abdullah, Ex P Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326; [2008] 6 MLJ cxxv; [2008] 6 MLJA 125 relating to *stare decisis* made the following observation:

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that it is necessary for each lower tier in the court structure to accept loyally the decision of the higher tiers.
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> Having stated the above, this article will consider the recent High Court's decision in *Re Hj Khalid Abdullah; Ex p Danaharta Urus Sdn Bhd*, in relation to the doctrine of *stare decisis.* In the above case, Hamid Sultan Abu Backer JC stated, *inter alia*, that:
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> > When an apex court decision is fatally flawed and will cause substantive injustice, then the *stare decisis* principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of *stare decisis*, they were not focused on issues relating to appellate courts "decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply the principles of *stare decisis* to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of *stare decisis*."

In addition in *Chai Kheng Lung v. Inspector Dzulkarnain Abdul Karim & Anor* [2009] 7 CLJ 133, I have made the following observation:

> This does not mean that the High Court is restricted by the doctrine of judicial precedent to take the revolutionary measures within the parameters of legal jurisprudence to advance justice (see HRH Raja Nazrin Shah – speech at Judges Conference on 9 April 2008 relating to judicial precedent (see *Re Haji Khalid bin Abdullah; ex parte Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326; [2007] 6 AMR 694).

[12] It must not be forgotten that the High Court, Court of Appeal and Federal Court are superior courts vested with jurisdiction and/or power to protect the constitution. It is not permissible by judicial interpretation of the constitution to reduce the status of the superior courts to tribunals; as only tribunals or inferior courts are solely dependent on the statute for its jurisdiction and powers. And to a large extent there is no merit in the judicial power argument raised by appellant in respect of registrar as the registrar power to hear cases is limited to the powers provided by statute, rules, etc; And that power cannot be equated to judicial powers vested in the superior courts.

[13] After having given much consideration to the second line of argument relating to jurisdiction of the registrar by the appellant I take the view that the issue raised by the appellant cannot be entertained at the High Court stage as the law, practice and procedure in bankruptcy matters recognises the role of registrars. My reasons *inter alia*, in line with the respondent's submission are as follows:

(i) The relevant provision in the Act conferring the jurisdiction in bankruptcy on the High Court is s. 88 of the Act which section provides as follows:

> The High Court shall be the court having jurisdiction in bankruptcy under this Act.

(ii) The Act further provides in s. 90 that:

> (1) The Registrar shall have the powers and jurisdiction in this section mentioned, and any order made or act done by him in the exercise of the said powers and jurisdiction shall, subject to an appeal, be deemed the order or act of the court.

A (2) Subject to any rules made by the Minister limiting the powers conferred by this section the Registrar shall have power:

(a) to make interim orders in any case of urgency where a Judge cannot be found in the State in which an application for the relief has been duly made;

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(b) to hear and determine any application as may be directed by the Chief Justice from time to time.

(iii) In addition, r. 5 of the said Rules provides that the "jurisdiction of the court to hear and determine any matter or application may be exercised by the registrar" unless the Chief Justice has given a general or special direction to the contrary. "Court" has been defined, in r. 3 of the said rules as including a registrar when exercising the powers of the court pursuant to the Act or these Rules.

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(iv) There is no general or special direction to the contrary issued by the Chief Justice. In fact, in relation to bankruptcy, there is a specific direction issued by the Chief Justice on the matters that can be heard by the registrar. The relevant Practice Direction is Arahan Amalan No. 3 Tahun 1993 and the hearing of creditors petition is one such application which can be heard by the registrar.

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(v) The provision on the appointment of the registrar has also provided that the same to have jurisdiction and powers which are subject to any written law and in addition such further jurisdiction, powers as may be prescribed by rules of court in s. 10(3).

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G (vi) The granting of jurisdiction and powers on the registrar is not inconsistent with the Federal Constitution since the Federal Constitution expressly recognises the role of registrar of the High Courts and the fact that they are entitled to make decisions which may be appealable under Federal law to the Judge of the High Court.

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(vii) Even in the absence of specific written law such as the Act or the said Rules, the RHC 1980 which is a rule of court made in the exercise of the powers conferred by the CJA 1964 gives power to the registrar. The pertinent provision in the RHC 1980 is O. 32 r. 9 which provided as follows:

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> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

(viii) The jurisdiction and power of the registrar to hear matters are recognised in other areas of the court proceedings such as foreclosure proceedings. Edgar Joseph Jr J (as he then was) in the case of *Malayan United Finance Bhd v. Adsonii (M) Sdn Bhd* [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435 stated as follows:

> The Senior Assistant Registrar, be it noted, has very ample powers which are spelt out in O. 32 r. 9, of the Rules of the High Court 1980, the effect of which is that the jurisdiction of the Registrar is equated to that of a Judge in chambers except matters which the Chief Justice may direct or which under the rules may only be transacted by a Judge; neither of these exceptions was relevant to the present case. Moreover, it should not be overlooked, in making the order permitting the chargee/applicant to bid at the auction, the Senior Assistant Registrar was merely acting as a delegate for the Judge.

(ix) The argument of the appellant that the registrar in hearing creditors petition is exercising judicial power contrary to art. 121 cannot *per se* be correct in the right perspective. The decision of the registrar is not final and is appealable by way of rehearing pursuant to Rules of Procedure. And the final decision maker is the judge of the High Court which decision is appealable pursuant to Act of parliament. This distinction must be kept in mind. And the Court of Appeal and the Federal Court are only obliged to look at the decision of the judge of the High Court and not the decision of the registrar. There is also greater protection under s. 90(1) of the BA 1967 for the judgment debtor, as the decision of the registrar is not final when there is an appeal. And in consequence the registrar's order is by design stayed until the disposal of the appeal by the judge.

[14] I have read the relevant application, affidavits and submission of the parties in detail. After giving much consideration to the submission of the learned counsel for the appellant I take the view the appeal must be dismissed. My reasons *inter alia* are as follows:

(a) On the issue of merits of the appeal the appellant *inter alia* says that: (i) B.N. is invalid because the B.N is not in accordance with the terms of the amended judgment; (ii) Creditors petition is not valid and void on the grounds that the creditor petition did not state that Ooi Jung Liang was authorised under the seal. I have perused the papers in detail, and I find that the proceedings were regular and that the appellant did not raise the above issues and other issues at the material stage of the proceedings when he had all the opportunity in law to do so. It is too late for the judgment debtor to raise the same. Support for the proposition is found in a number of cases. Some of them are as follows: (a) *In Re Bahanudin Hj Mokhtar, ex p RHB Bank And Other Appeals* [2000] 1 CLJ 593 (b) In *Re Amarjit Kaur Bakhshis Singh, ex p BSN Commercial Bank (Malaysia) Bhd* [2001] 1 CLJ 412 (c) In *Affin Bank Bhd v. Tan Sri Kishu Tirathrai* [2008] 2 CLJ 448 (d) In *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 (e) In *Re Woo Yoke San; Ex P OCBC Bank Bhd* [2006] 2 CLJ 589.

(b) On the issue that the creditor's petition is not valid and void because Ooi Jung Liang was not authorised under seal, I take the view that it is too late in the day to take the objection. In addition r. 215 BR 1969 specifically states:

> Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an "officer" within section 133, and if duly authorised under seal can act for the corporation.

In *Re Tan Sri Amin Shah Omar Shah; Ex p Affin Bank Bhd* [2008] 9 CLJ 772, Mohd Hishamudin J (as he then was) stated as follows:

> When the presentation is pursuant to the second (alternative) limb of r. 215, the officer signing does not need to be armed with a power of attorney. All that he is required to have is the authority to sign and to present the petition; and in the petition and verifying affidavit he must state that he is an officer of the company/creditor and that as an officer he is duly authorised by the company to sign and to present the petition on behalf of the company. Since in the present case the signing and presentation of the petition was by an authorised officer of the creditor pursuant to r. 215, therefore, the argument of the debtor's counsel pertaining to the power of attorney issued to the officer Mohamad Aslam, even if a power of attorney had been issued to him, is totally irrelevant.

(see also *In re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd* [2001] 8 CLJ 226). In *Re Mat Shah Safuan; Ex P United Asian Bank Bhd* [1990] 1 LNS 115, wherein Siti Norma J (as then was) stated as follows:

> From the petition in these proceedings, it is clear that it is presented by the judgment creditor, a corporate body and signed by S Sinnappan, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb of r. 215 ... By virtue of his official standing alone, he has every authority to present a petition on behalf of the judgment creditor and there is no question that he needs the authority to use the seal of the judgment creditor or that there must be a board resolution passed authorizing him to use the seal. That is only relevant where a corporation chooses an agent, who is not a bank officer, to act on its behalf and under those circumstances, the agent is also referred to as 'an officer' within the meaning of s. 133(a) of the Act.

[15] For reasons stated above I dismiss the appeal with no order as to costs.

I hereby order so.